given by the consignor, *Held*, Magruder, J. dissenting, that the transaction constituted an agency and not a conditional sale, hence the goods were not subject to execution. *Fleet* v. *Hertz* (1903), — Ill. —, 66 N. E. Rep. 858 (reversing 98 Ill. App. 564).

The circumstances of this case bring it very close to the dividing line. The consignee was to remit for goods sold, according to fixed invoice prices, with nothing said as to retail prices, commissions, or return of goods unsold, and was to bear expense of shipping, insurance, etc. No remittances were made except a stranger's note received in an independent transaction, but appellant, knowing consignee's condition and without seizing the remaining goods insisted on a settlement. The parties in their correspondence spoke of the debt and money owing and of the goods "bought." "In construing these anomalous instruments courts look chiefly at the essential nature and preponderating features of the whole instrument and not at the peculiar form of isolated parts of it." MECHEM ON SALES, sec. 46 and cases cited. For a review of the authorities see *Arbuckle* v. *Kirkpatrick*, 98 Tenn. 221, 39 S. W. R. 3, 36 L. R. A. 285; note 22 L. R. A. 850; also the recent case of *Cooper* v. *Bailey*, — Tex. — 73 S. W. R. 724.

SALES—FOR CASH—PAYMENT WITH OLD ACCOUNT.—Plaintiff contracted to sell defendant certain specific property to be paid for on delivery. When the latter had obtained possession of the goods he refused to pay cash but tendered an account due him from plaintiff. In an action of detinue, *Held*, that no title passed and the goods could be recovered. *Drake* v. *Scott* (1903), — Ala. —, 33 So. Rep. 873.

When delivery and payment are expressly or impliedly made concurrent acts the buyer cannot tender in payment an old account or the vendor's matured note. *Wabash Elevator Co.* v. *Bank*, 23 Oh. St. 311; *Wilmarth* v. *Mountford*, 4 Wash. (U. S. C. C.) 79, 30 Fed. Cas. p. 70; *Allen* v. *Hartfield*, 76 Ill. 358; *Barker* v. *Walbridge*, 14 Minn. 469; *Woolsey* v. *Axton*, 192 Pa. St. 526, 43 Atl. R. 1029; *Bush* v. *Bender*, 113 Pa. St. 94, 4 Atl. R. 213. If, however, the seller sues for the price instead of the goods, the buyer may set-off any proper claim. MECHEM ON SALES, sec. 1438, citing *Eland* v. *Karr*, 1 East 375; *Cornforth* v. *Rivett*, 2 M. & Sel. 510; so if the contract when made passes title and delivery is complete (See case and note following:) *Baker* v. *Fisher*, 19 Ont. Rep. 650.

SALES FOR CASH—PASSING OF TITLE—WAIVER OF CONDITION.—Plaintiff sold furniture to R, who agreed to pay cash therefor. It was delivered from time to time during a month and placed on premises leased by R from defendant. Delivery was completed during plaintiff's absence. On his return he demanded payment, receiving part and a promise of the balance at once. Next day R asked for credit and plaintiff took a chattel mortgage on the furniture. In a suit on the mortgage defendant intervened claiming a landlord's lien. *Held*, that title to the goods remained in plaintiff until the mortgage was taken. *Austin* v. *Welch* (1903), — Tex. —, 72 S. W. Rep. 881.

A contract of sale of a specific chattel for cash may mean either of two things: that payment is a condition precedent to the passing of title, or a condition precedent to the right to possession, which right would be divested by delivery, leaving the seller only a personal remedy. Courts have sometimes failed to observe clearly this distinction. Each case depends upon its own particular circumstances. BENJAMIN ON SALES, (7th Am. ed.) note 4, p. 298; MECHEM ON SALES, sec. 541, where authorities are collected. Whether or not there has been a waiver is a question for the jury. MECHEM ON SALES, sec. 549 and cases cited.